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AUGMENTING OUR REALITY: THE (UN)OFFICIAL STRATEGY GUIDE TO PROVIDING FIRST AMENDMENT PROTECTION FOR PLAYERS AND DESIGNERS OF LOCATION-BASED AUGMENTED REALITY VIDEO GAMES

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INTRODUCTION

It is a warm July night, and the weather is perfect for a stroll. You make your way towards the local park, expecting to clear your head in quiet solitude. To your dismay, something is awry. Dozens—perhaps hundreds—of people have invaded in and around your lovely local park. Now that this gathering has tainted your walk, you approach someone, hoping that he will explain what has happened. Before you can utter, “Excuse me,” people start shouting about a “vapoleon.” Then the stampede begins.

This bizarre scenario described above actually occurred in Central Park in New York City after the release of Pokémon Go.¹ Pokémon Go is a location-based augmented reality game that allows a person to catch virtual creatures, known as “pokémon,” through the screen of her phone.² Not only has the game spawned thousands of pokémon, but it has also spawned dozens of questions regarding how the law should adapt in response to

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¹ R. Darren Price, *Rare Pokemon Sparks Stampede in Central Park*, NBC 4 NEW YORK (July 18, 2016), <http://www.nbcnewyork.com/news/local/Pokemon-Go-Players-Stampede-New-York-Central-Park-387303572.html>. Central Park was not the only place to have a stampede caused by Pokémon Go players. Other stampedes occurred in Kaka'ako and Taipei, to name a few places. See Sunset Beach, *Pokémon GO! Stampede: Kaka'ako, Honolulu, Oahu, Hawaii (08/13/2016)*, YOUTUBE (Aug. 15, 2016), <https://youtu.be/klUPu3Kvamc>.

² See Andrew L. Rossow, *Gotta Catch . . . a Lawsuit? A Legal Insight into the Intellectual, Civil, and Criminal Battlefield 'Pokémon Go' Has Downloaded onto Smartphones and Properties Around the World*, 16 J. MARSHALL REV. INTELL. PROP. L. 329, 330 (2017).

the game and others like it.³ Important among these legal questions is how augmented reality games such as Pokémon Go intersect with the First Amendment.⁴ This question has yet to receive serious attention in the scholarly literature.

What exactly is augmented reality? It is “an enhanced version of reality created by the use of technology to overlay digital information on an image of something being viewed through a device.”⁵ In other words, augmented reality projects digital images into the real world, and people see these images through an electronic device.⁶ Location-based augmented reality, also known as markerless augmented reality, uses GPS to function.⁷ Although there are other types of augmented reality,⁸ this Note will discuss only location-based augmented reality.

³ These issues mainly revolve around property and tort law. For an overview of many of these private law issues, see generally Russow, *supra* note 2; Samuel Mallick, Note, *Augmenting Property Law: Applying the Right To Exclude in the Augmented Reality Universe*, 19 VAND. J. ENT. & TECH. L. 1057 (2017); Pramitha Krishnamurthyprakash, *Potential Post-Pokémon Legal Issues for Augmented Reality*, LAW360 (Mar. 2, 2017), <https://www.law360.com/articles/890096/potential-post-poke-mon-legal-issues-for-augmented-reality>.

⁴ But see Brian Wassom, *Sacred Ground: When (Augmented) Worlds Collide*, AUGMENTED LEGALITY (July 15, 2017), <http://www.wassom.com/sacred-ground-augmented-worlds-collide.html>. In his blog, Wassom makes an interesting argument that as augmented reality video games become more common, there may be a dispute among different games being played in the same physical space. *Id.* Although he mentions in passing that the government might be able to prohibit the playing of these augmented reality games in public places, Wassom fails to address the issue any further. See *id.*

⁵ Ryan Mitchell, Comment, *Pokémon Go-es Directly to Court: How Pokémon Go Illustrates the Issue of Virtual Trespass and the Need for Evolved Tort Laws*, 49 TEX. TECH L. REV. 959, 962 (2017) (quoting *Augmented Reality*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014), <https://www.merriam-webster.com/dictionary/augmented%20reality>).

⁶ In contrast, virtual reality replaces the real world with an artificial environment that has been digitally created, and people interact with this digital environment. See Om Malik, *Pokémon Go Will Make You Crave Augmented Reality*, THE NEW YORKER (July 12, 2016), <https://www.newyorker.com/tech/elements/pokemon-go-will-make-you-crave-augmented-reality>.

⁷ See Sanket Prabhu, *Types of Augmented Reality (for Me and My Business)*, ARREVERIE LEARNING (Dec. 18, 2017), <http://www.arreverie.com/blogs/types-of-augmented-reality/>.

⁸ Other types include “marker-based” augmented reality, like QR codes, and “outlining” augmented reality, such as the lines that appear on side and rearview backup cameras in modern cars. See *id.* Even Snapchat utilizes augmented reality for its filters. See Husain Sumra, *Augmented Reality Explained: What Is AR and What's Coming?*, WAREABLE (Apr. 25, 2018), <https://www.wareable.com/ar/every-thing-you-need-to-know-about-augmented-reality>.

Specifically, this Note will argue that the First Amendment applies to location-based augmented reality games in public forums, and, furthermore, the First Amendment protects designers and players of location-based augmented reality games in public forums. This Note will not discuss these location-based games within the context of privacy rights or trespassing, issues that have been written about elsewhere.⁹ Part I of this Note will explore the law regarding freedom of speech and freedom of assembly in public forums, and permissible regulations of speech and assembly, including time, place, and manner restrictions and prior restraints, such as permits. Part II will discuss *Candy Lab, Inc. v. Milwaukee County*, the first reported case to address whether location-based augmented reality games have First Amendment protection.¹⁰ Part III will explore the extent to which the First Amendment protects the designers and players of location-based augmented reality games, and possible regulations the government may use to lawfully curb the rights of the designers and players.

I. THE THORNY FIRST AMENDMENT DOCTRINE

A. General

The First Amendment is rich in case law; therefore, its analysis can be confusing.¹¹ With the advancement of technology, the Supreme Court has continued to apply the same doctrine,¹² albeit with new wrinkles that depend largely upon the medium the Court is analyzing.¹³ In *Brown v. Entertainment Merchants Ass'n*, the Court recognized that video games are forms of speech

⁹ See, e.g., Mallick, *supra* note 3, at 1057; Mitchell, *supra* note 5.

¹⁰ 266 F. Supp. 3d 1139 (E.D. Wis. 2017).

¹¹ For a summary of the development of the First Amendment and the benefits of the right of freedom of speech, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 11.1.1–11.1.2 (5th ed. 2015). The Supreme Court also discusses the value of this First Amendment freedom in *Cohen v. California*. 403 U.S. 15, 24–25 (1971).

¹² See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (“[W]hatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952))).

¹³ See *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (“The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself . . .”).

and therefore have First Amendment protection.¹⁴ By extension, location-based augmented reality video games should also enjoy some measure of First Amendment protection. Discussed below are various hallmarks of free speech and freedom of assembly jurisprudence that will form part of the discussion of First Amendment protections for location-based augmented reality video games, the designers of these games, and the players of these games.

B. *Content-Based Versus Content-Neutral*

"[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁵ Therefore, "[c]ontent-based regulations are presumptively invalid"¹⁶ and "subject to strict scrutiny."¹⁷ A court determines whether a law is content-based by evaluating whether the law targets the topic or viewpoint of the speech.¹⁸ For example, a law that bans discussion of Harry Potter books but permits discussion of all other books would be content-based because it targets the topic of the speech.¹⁹ Another subset of content-based regulation is viewpoint-based regulation,²⁰ which is considered more suspect than regulations

¹⁴ 564 U.S. at 790.

¹⁵ *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (citing *Cohen*, 403 U.S. at 24).

¹⁶ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)); *see also City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (citing *Simon & Schuster*, 502 U.S. at 115, 118).

¹⁷ *Alameda Books*, 535 U.S. at 434 (citing *Simon & Schuster*, 502 U.S. at 115, 118); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." (citing *Simon & Schuster*, 502 U.S. at 115)).

¹⁸ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (citing *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663–64 (2011)). The Court also states that it will consider a law content-based if it appears facially content-neutral but "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (second alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

¹⁹ *Carey v. Brown* demonstrates this kind of content-based law. 447 U.S. 455 (1980). There, an ordinance prohibited picketing in residential neighborhoods unless it was related to a labor dispute for a place of employment. *Id.* at 457. The Supreme Court struck down the ordinance because it favored labor picketing over nonlabor picketing, and such targeting of the topic of the speech was unconstitutional. *Id.* at 461–63.

²⁰ *See Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980).

targeting topics of speech.²¹ A law targets the viewpoint of the speech and therefore is also content-based if, for example, it allows pro-Harry Potter conventions but not anti-Harry Potter conventions. If a court determines that a law is content-based, then the “[g]overnment [must] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”²²

In contrast, a law is content-neutral if it is unrelated to the content of the speech.²³ For example, a general ban on the burning of books in parks would be content-neutral because the content of the books is irrelevant—no one is permitted to burn any book within a park.²⁴ The fact that the ban only applies to books and no other mediums does not equate to it being content-based.²⁵ The Supreme Court has described a law as content-neutral if it is “justified without reference to the content of the regulated speech.”²⁶ A law is content-neutral whether it “applies to all speech regardless of the message” or whether it regulates conduct and has an incidental effect on speech without regard to its content.²⁷ For example, suppose a group obtains a permit to hold a demonstration in a park to protest communism. As part of that demonstration, the group plans to burn books promoting communism. However, an ordinance bans the burning of books

²¹ Cf. *Hill v. Colorado*, 530 U.S. 703, 723 (2000) (“Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.” (citing *Consol. Edison Co. of N.Y.*, 447 U.S. at 538)).

²² *Reed*, 135 S. Ct. at 2231 (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)) (internal quotation marks omitted); see also, e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey*, 447 U.S. at 461).

²³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

²⁴ But see *United States v. Eichman*, 496 U.S. 310, 315–17 (1990). There, the government passed an act that banned the burning of United States flags. *Id.* at 314. Although the act had “no explicit content-based limitation[,]” the Court determined it was content-based because the government’s motive in passing this act was “related ‘to the suppression of free expression.’” *Id.* at 315 (quoting *Texas v. Johnson*, 491 U.S. 397, 410 (1989)). If the book burning ban described above was motivated by the government’s desire to suppress the opinions of people who believe in censorship, then it might be content-based despite appearing content-neutral.

²⁵ See *Candy Lab, Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139, 1149 (E.D. Wis. 2017) (“[A] speech regulation that applies to one medium (or subset thereof) but not others . . . ‘is insufficient by itself to raise First Amendment concerns.’” (quoting *Turner Broad. Sys.*, 512 U.S. at 660) (internal quotation marks omitted)).

²⁶ E.g., *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

²⁷ CHEMERINSKY, *supra* note 11, at 980.

in public parks because of the government's interests in preventing fires from spreading and protecting the parks. Although the ordinance has an incidental effect on the demonstrators' speech, the ordinance would still be content-neutral because the regulation of the conduct was without regard to the content.²⁸

C. *Public Forums*

Public forums are difficult to categorize. They are government property open to the public, but the circumstances surrounding the facts of each case determine the availability for speech within a particular forum.²⁹ The "character of the property at issue" will determine a person's right to access that property and the limitations that the government may place on a person's rights regarding that property.³⁰ Legislatures may enact statutes "which prevent[] serious interference with normal usage of streets and parks."³¹ For example, people may speak in a park or on the street without any hesitation, but imagine people having a conversation about *Game of Thrones* in the middle of a courtroom while a trial is occurring. Generally, courts consider areas like streets, parks, and sidewalks to be public forums that are open for speech.³² In these "quintessential public forums, the government may not prohibit all communicative activity"³³—even if allowing such speech imposes costs on the government.³⁴

²⁸ Cf. *Clark*, 468 U.S. at 294–95 (concluding that the prohibition on sleeping in the park was content-neutral and had nothing to do with curbing the expressive message of the demonstrators' sleeping).

²⁹ See CHEMERINSKY, *supra* note 11, § 11.4.2.1, at 1187.

³⁰ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

³¹ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (quoting *Kunz v. New York*, 340 U.S. 290, 293–94 (1951)) (internal quotation marks omitted).

³² See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (citing *Perry Educ. Ass'n*, 460 U.S. at 45) ("[M]embers of the public retain strong free speech rights when they venture into public streets and parks . . ."); see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). But see *United States v. Kokinda*, 497 U.S. 720, 727–30 (1990) (determining that a sidewalk on post office property was a non-public forum, not a traditional public forum).

³³ *Perry Educ. Ass'n*, 460 U.S. at 45.

³⁴ See *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) ("Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect

Although there are other types of forums which would include areas like public libraries and prisons,³⁵ the focus of this Note will be on First Amendment rights regarding traditional public forums like parks, streets, and sidewalks.

D. Vagueness and Overbreadth

Vagueness and overbreadth are common issues in cases involving freedom of speech in public forums. A statute is unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”³⁶ Although the vagueness doctrine developed from the Due Process Clause of the Fifth Amendment,³⁷ it is equally important in cases involving the First Amendment. The Court has noted that freedom of speech must be protected, not only because it is important in society but also because the right itself would be easy to destroy.³⁸ Therefore, “standards of permissible statutory vagueness are strict in the area of free expression.”³⁹ That being said, the Court

consequence of such distribution [of leaflets] results from the constitutional protection of the freedom of speech and press.”).

³⁵ Other forum categories are designated public forums, which the government has opened for use by the public, and non-public forums, which the government uses for an intended purpose other than the freedom of speech. *Perry Educ. Ass’n*, 460 U.S. at 45. A library would be a designated, or limited, public forum. *See Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261–62 (3d Cir. 1992). Meanwhile, a prison would be a non-public forum. *See Adderley v. Florida*, 385 U.S. 39, 47 (1966). For a summary of the considerations that the Supreme Court uses to determine the type of forum, see CHEMERINSKY, *supra* note 11, § 11.4.2.6, at 1209.

³⁶ *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (concluding that a law is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning and differ as to its application”).

³⁷ *Williams*, 553 U.S. at 304.

³⁸ *See NAACP v. Button*, 371 U.S. 415, 433 (1963) (“[Freedom of speech is] delicate and vulnerable, as well as supremely precious in our society. . . First Amendment freedoms need breathing space to survive . . .”).

³⁹ *Id.* at 432.

acknowledges that language itself is vague.⁴⁰ Thus, while the vagueness standards require “narrow specificity,”⁴¹ the Court does not expect “perfect clarity.”⁴²

Overbreadth occurs when a law “prohibits a substantial amount of protected speech.”⁴³ “[S]ubstantial overbreadth” does not merely mean that a Court will deem a statute as overbroad because there are a few scenarios in which the statute would “impermissibl[y]” apply to First Amendment rights.⁴⁴ Instead, the statute must threaten to significantly curb recognized freedom of speech rights for it to be potentially overbroad.⁴⁵ This requirement that the overbreadth be substantial likely stems from the fact that a person who violated a permissible application of the law can argue that the law would impermissibly apply to third parties.⁴⁶ Although litigating for a third party generally is prohibited,⁴⁷ the overbreadth doctrine is an exception.

E. Expressive Conduct

The Court does not recognize all conduct as speech.⁴⁸ To be protected under the First Amendment, an activity needs to have more than a “kernel of expression.”⁴⁹ Once the Court recognizes that conduct has First Amendment protection, “[t]he government generally has a freer hand in restricting expressive conduct than

⁴⁰ See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (“Condemned to the use of words, we can never expect mathematical certainty from our language.”).

⁴¹ *Button*, 371 U.S. at 433.

⁴² *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (“[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”).

⁴³ *United States v. Williams*, 553 U.S. 285, 292 (2008); see also CHEMERINSKY, *supra* note 11, § 11.2.2.

⁴⁴ *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

⁴⁵ *Id.* at 801 (“[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.”).

⁴⁶ *Cf. Williams*, 553 U.S. at 292 (explaining that the requirement for substantial overbreadth is to balance the need to deter the chilling of free speech with the wish not to strike down a perfectly constitutional law).

⁴⁷ See *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The issue of standing would arise in such situations, but that is beyond the scope of this Note. For a general discussion about standing and third parties, see CHEMERINSKY, *supra* note 11, § 2.5.4.

⁴⁸ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ . . .”).

⁴⁹ *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

it has in restricting the written or spoken word.”⁵⁰ Expressive conduct may be subject to a reasonable time, place, and manner restriction.⁵¹

F. Time, Place, and Manner Restrictions

The aim of a “time, place, and manner restriction” is for “the government to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech.”⁵² Time, place, and manner restrictions are reasonable, and therefore permissible, “provided [that they] ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”⁵³ In *Ward v. Rock Against Racism*, the Court stated that while a time, place, and manner restriction must be “narrowly tailored” to meet the government’s interest, it does not have to be the “least restrictive or least intrusive means of doing so.”⁵⁴ The Court did note, however, that the restriction also may not “burden substantially more speech than is necessary to further the government’s legitimate interests.”⁵⁵

A time, place, and manner restriction is justified without reference to the content of the regulated speech when it is content-neutral.⁵⁶ For example, in *Thomas v. Chicago Park*

⁵⁰ *Texas v. Johnson*, 491 U.S. 397, 406 (1989). *But see* James. M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 25–26 (2008) (“[T]he *Johnson* claim that courts have a ‘freer hand’ in regulating symbolic speech was in error. . . . The only difference that should exist between the test for symbolic speech and pure speech should relate to any difference in state interests raised by the symbolic aspects to the speech.”).

⁵¹ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

⁵² CHEMERINSKY, *supra* note 11, § 11.4.2.2, at 1194.

⁵³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark*, 468 U.S. at 293); *Clark*, 468 U.S. at 293; *see also* *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981). *But see generally* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996). In his essay, Volokh argues that courts should reject the strict scrutiny analysis altogether because it leads to inconsistent outcomes. *Id.* at 2460–61.

⁵⁴ *Ward*, 491 U.S. at 798.

⁵⁵ *Id.* at 799; *see also* *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).

⁵⁶ *See supra* note 15 and accompanying text. Occasionally, a time, place, and manner restriction will be upheld despite being content-based. *See* *Burson v. Freeman*, 504 U.S. 191, 197–98, 211 (1992) (holding that requiring solicitors of votes to stand one hundred feet away from the entrance of a polling place satisfied strict scrutiny).

District, the Court held that an ordinance requiring persons to obtain a permit when there is a gathering of fifty or more people was a content-neutral time, place, and manner restriction.⁵⁷ The Court reasoned that it was content-neutral because any gathering of fifty or more people required a permit regardless of what the gathering was for.⁵⁸ Furthermore, denial of a permit was irrelevant to the content of the speech.⁵⁹

Once the Court has established that the law is content-neutral, it will determine if the law is narrowly tailored for that significant governmental interest.⁶⁰ Several significant governmental interests that the Supreme Court has recognized include protecting "traditional public forums" from "excessive noise,"⁶¹ "ensuring public safety,"⁶² allowing pedestrians and motor vehicles to move about freely,⁶³ "avoiding visual clutter,"⁶⁴ and protecting national parks.⁶⁵ In acknowledging these significant government interests, the Court recognizes the rights of the majority in society. For example, by protecting public forums from excessive noise, the government is protecting the unwilling listener's "right to be let alone."⁶⁶ The right to be let alone remains a "recognizable privacy interest in avoiding unwanted communication" although the right is much less important in public forums than it is in one's own home.⁶⁷

⁵⁷ *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002).

⁵⁸ *Id.*

⁵⁹ *Id.* When a permit was denied, the Park District had to explain in writing why the permit was denied and, when possible, suggest ways to cure defects in the application. *Id.* at 318–19. If denial was due to that place being unavailable, the Park District had to suggest other times or places to hold the event. *Id.* at 319.

⁶⁰ See *McCullen*, 134 S. Ct. at 2530 ("The content-neutrality prong of the *Ward* test is logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny.").

⁶¹ See *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

⁶² See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997).

⁶³ See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).

⁶⁴ *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806–07 (1984).

⁶⁵ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 297–98 (1984).

⁶⁶ See *Hill v. Colorado*, 530 U.S. 703, 716–17 (2000) ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting))).

⁶⁷ *Id.* at 716.

Despite the Court recognizing these governmental interests as significant, the law may still fail if “a substantial portion of the burden on speech does not serve to advance [the government’s] goals.”⁶⁸ For example, in *United States v. Grace*, the Supreme Court struck down a regulation that prohibited persons on the public sidewalks surrounding a courthouse from displaying flags, signs, or other devices that would draw the public’s attention to any organization.⁶⁹ The Court reasoned that the government had enacted the regulation to ensure peace and order around the courthouse, but this total ban on the sidewalk did not advance this governmental interest.⁷⁰ Thus, the ban was not justified, and the Court struck it down.⁷¹

Finally, if the Court finds that a law is content-neutral and is narrowly tailored to serve a significant government interest, it will uphold the law if ample alternative channels of communication remain. *Clark v. Community for Creative Non-Violence* provides an excellent example of this ample alternative channels prong.⁷² There, demonstrators wished to call attention to the homeless by, among other things, sleeping in tents in a park.⁷³ Yet, the demonstration was to occur in a park where people were not allowed to sleep.⁷⁴ The demonstrators argued that the inability to sleep in the parks curtailed their ability to demonstrate the plight of the homeless.⁷⁵ The Supreme Court agreed with the demonstrators but ultimately decided that the time, place, and manner restriction was reasonable.⁷⁶ The demonstrators had been permitted to erect a symbolic tent city and continue a twenty-four-hour vigil; therefore, the Court was satisfied with the other channels of communication open to the demonstrators.⁷⁷

⁶⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

⁶⁹ 461 U.S. 171, 183–84 (1983).

⁷⁰ *Id.* at 182; *see also Ward*, 491 U.S. at 799.

⁷¹ *Grace*, 461 U.S. at 183.

⁷² 468 U.S. 288 (1984).

⁷³ *Id.* at 289.

⁷⁴ *Id.* at 290–91. More specifically, park regulations prohibited camping in this park. *Id.* “Camping,” as defined in the regulation, included “using any tents or . . . other structure . . . for sleeping.” *Id.* (alteration in original).

⁷⁵ *Id.* at 296.

⁷⁶ *Id.* at 298.

⁷⁷ *Id.* at 295.

G. *Prior Restraints – Permits*

A “prior restraint” “describe[s] administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”⁷⁸ Common types of prior restraints are license and permit requirements.⁷⁹ Although prior restraints are presumptively invalid,⁸⁰ the Supreme Court will often uphold a permit or license requirement as a reasonable time, place, and manner restriction if it meets three criteria.⁸¹

First, the government must have an important reason to require a license or permit.⁸² For example, the government may require a permit to host a parade or demonstration to prevent multiple groups from attempting to use the same space at one time and to give the government notice to provide “proper policing.”⁸³ Second, the government must provide clear standards that “leav[e] almost no discretion to the licensing authority.”⁸⁴ The reason for limiting discretion is clear: Such discretion could easily lead to censorship of viewpoints that the license-granting authority disagrees with.⁸⁵ Finally, the licensing or permit system must have procedural safeguards.⁸⁶ When the government requires permits in a public forum, it does not violate the procedural safeguard prong by failing to initiate litigation every time it denies a permit.⁸⁷ As long as the licensing

⁷⁸ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis omitted).

⁷⁹ CHEMERINSKY, *supra* note 11, § 11.2.3.4, at 1011.

⁸⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

⁸¹ CHEMERINSKY, *supra* note 11, § 11.2.3.4, at 1011.

⁸² *Id.*

⁸³ *See Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

⁸⁴ CHEMERINSKY, *supra* note 11, § 11.2.3.4, at 1011; *cf. Cox*, 312 U.S. at 576 (“[T]he licensing board [is] not vested with arbitrary power or an unfettered discretion . . . its discretion must be exercised with ‘uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination . . .’”).

⁸⁵ *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 284 (1951) (concluding that the City Council denied permits to the Jehovah’s Witnesses because it disagreed with their opinions); *see also City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988) (“[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”).

⁸⁶ CHEMERINSKY, *supra* note 11, § 11.2.3.4, at 1011, 1013.

⁸⁷ *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002). *But see Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (“The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.”).

authorities have almost no discretion, and there is some form of review, the permit requirement in a public forum has passed the procedural safeguard prong.⁸⁸

H. *Freedoms of Assembly and Association*

“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”⁸⁹ It “[is] regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights”⁹⁰ An assembly of people may advocate their views more effectively than only one or two people advocating something because others may more easily ignore them.⁹¹ Indeed, the act of assembling itself is a form of expression.⁹² People may assemble for a variety of reasons, including to speak, to learn, to watch, to play, or to advocate; and most assembly in a public forum is acceptable as long as it is for a “lawful purpose.”⁹³ However, the right of assembly may be curtailed by reasonable time, place, and manner restrictions.⁹⁴ For example, people are generally not permitted to assemble in the middle of a busy intersection because that would interfere with the free flow of traffic.⁹⁵

Related to the freedom of assembly is the freedom of association.⁹⁶ The First Amendment protects the freedom of association,⁹⁷ regardless of whether the group is religious or

⁸⁸ See, e.g., *Thomas*, 534 U.S. at 324.

⁸⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)) (internal quotation marks omitted).

⁹⁰ *Id.* at 577.

⁹¹ See *infra* note 100; see also John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 597 (2010).

⁹² See Inazu, *supra* note 91.

⁹³ *Richmond Newspapers*, 448 U.S. at 578 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 519 (1939) (Stone, J., concurring)).

⁹⁴ See *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (“The rights of free speech and assembly . . . do not mean that everyone with opinions or beliefs to express may address a group at any public space and at any time.”).

⁹⁵ See *id.* at 554–55 (“[One cannot] insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. . . . A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.”).

⁹⁶ See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 990 (2011).

⁹⁷ *Dawson v. Delaware*, 503 U.S. 159, 163 (1992); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *United States v. Robel*, 389 U.S. 258, 263 (1967); *Elfbbrandt v. Russell*, 384 U.S. 11, 18 (1966).

secular⁹⁸ and regardless of whether it “associate[s] for the ‘purpose’ of disseminating a certain message.”⁹⁹ Derived from the freedom of assembly and freedom of speech, the Court first recognized the freedom of association in *NAACP v. Alabama ex rel. Patterson*.¹⁰⁰ Although the Supreme Court has sometimes used the freedoms of assembly and association interchangeably,¹⁰¹ “assemblies were probably understood as ad hoc groups gathered in public or private while associations constituted more permanent groupings of citizens, meeting either publicly or in private.”¹⁰²

“An association must . . . engage in expressive activity that could be impaired in order to be entitled to protection.”¹⁰³ The First Amendment protects associations despite when some members of a group act or advocate in ways that are not protected.¹⁰⁴ Although the Supreme Court has stated that it will “give deference to an association’s view of what would impair its expression,”¹⁰⁵ it has imposed limitations to the breadth of its deference. For example, a court will not protect people’s freedom

⁹⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

⁹⁹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

¹⁰⁰ 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”); *see also* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 1–2 (1964); Inazu, *supra* note 91, at 609.

¹⁰¹ Bhagwat, *supra* note 96, at 984; *see, e.g., Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 409, 411 (1950).

¹⁰² *See* Bhagwat, *supra* note 96, at 990 (citing John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 *TENN. L. REV.* 485, 491 (2010)).

¹⁰³ *Dale*, 530 U.S. at 655.

¹⁰⁴ *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (“The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.”); *see also De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“If the persons assembling have committed crimes elsewhere, . . . they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.”).

¹⁰⁵ *Dale*, 530 U.S. at 653.

to associate to the extent that they are doing something illegal,¹⁰⁶ nor will it protect the freedom of association when the purpose of that association is to “depriv[e] third parties of their lawful rights.”¹⁰⁷

II. CANDY LAB, INC. V. MILWAUKEE COUNTY

At the time of writing this Note, *Candy Lab, Inc. v. Milwaukee County* is unique because it is the first and only case that addresses First Amendment protections related to location-based augmented reality games in public forums.¹⁰⁸ In *Candy Lab*, the Eastern District of Wisconsin granted a preliminary injunction against the enforcement of an ordinance that would require a company to obtain a permit for its location-based augmented reality game to be played in parks.¹⁰⁹

The ordinance itself was adopted in light of the unanticipated popularity of Pokémon Go.¹¹⁰ At the game’s peak, Pokémon Go “players trashed Milwaukee County parks, stayed after park hours, caused significant traffic congestion, and made excessive noise.”¹¹¹ In response, Milwaukee County spent thousands of dollars to maintain its parks and provide more police services.¹¹² Additionally, the County passed an ordinance

¹⁰⁶ See, e.g., *Claiborne Hardware Co.*, 458 U.S. at 933 (recognizing the legitimacy of the demonstrators’ objectives but refusing to protect the violent conduct of some of the demonstrators).

¹⁰⁷ *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

¹⁰⁸ See Kimberly I. Culp & Taylor Sachs, *Candy Lab and the Changing Reality of Augmented Reality*, LAW360 (Aug. 22, 2017), <https://www.law360.com/articles/956398/candy-lab-and-the-changing-reality-of-augmented-reality>; see also Brian Wassom, *Game On: Candy Lab AR Files First Amendment Challenge to Milwaukee’s Pokémon Go-Inspired Ordinance*, AUGMENTED LEGALITY (Apr. 21, 2017), <http://www.wassom.com/game-candy-lab-ar-files-first-amendment-challenge-milwaukeees-pokemon-go-inspired-ordinance.html#more-6545>. The court itself also acknowledges that it is deciding on very new issues. See *Candy Lab, Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139, 1145 (E.D. Wis. 2017). As a side note, a class action lawsuit has been filed against Niantic, the company that created Pokémon Go, because people have asserted their rights to privacy against Niantic. See Class Action Complaint at 3–4, *Marder v. Niantic, Inc.*, No. 4:16-cv-04300 (N.D. Cal. Jul. 29, 2016).

¹⁰⁹ 266 F. Supp. 3d at 1154.

¹¹⁰ See *id.* at 1142–43. Another Pokémon Go-related bill was proposed in Illinois. It was the “Location-Based Video Game Protection Act,” otherwise known as “Pidgey’s Law.” See H.B. 6601, 99th Gen. Assemb., Reg. Sess. (Ill. 2016). The purpose of the bill was to provide a property owner a procedure to have a location-based video game removed from the owner’s property. *Id.* It is unlikely that this bill will be passed, however, because it was adjourned sine die on January 10, 2017. *Id.*

¹¹¹ *Candy Lab*, 266 F. Supp. 3d at 1141.

¹¹² *Id.*

that required companies to obtain permits before their location-based augmented reality games could be played in Milwaukee County Parks.¹¹³

Candy Lab, Inc. was a company that developed the app “Texas Rope ‘Em,” which is a location-based augmented reality game.¹¹⁴ Texas Rope ‘Em is similar to a traditional poker game, and part of the gameplay involves players traveling to real-world locations to collect cards.¹¹⁵ These cards are then used when playing against the dealer in the game.¹¹⁶ Candy Lab, Inc. moved for a preliminary injunction against enforcement of Milwaukee County’s permit requirement.¹¹⁷

In granting the preliminary injunction, the court considered many issues that arose regarding the rights of an augmented reality game.¹¹⁸ Did the game qualify as a “game” that was protected under the First Amendment? Was the permit content-neutral? Did it provide little discretion to the licensing authority? Was the ordinance itself unconstitutionally vague or overbroad? Or was it narrowly tailored to serve a substantial government interest? Did the government leave ample alternative channels of communication, or did the ordinance substantially burden more speech than necessary?

¹¹³ *Id.* This ordinance is not the first one a legislature has passed to prevent children from playing games. The *Candy Lab* court cites to the case *Weigand v. Village of Tinley Park*, where a town ordinance prohibited anyone “to play any games upon any street, alley, or sidewalk, or other public places except when a block party permit has been issued by the President and the Board of Trustees.” 114 F. Supp. 2d 734, 736 (N.D. Ill. 2000). Because of this ordinance, police ticketed parents, calling them “irresponsib[le]” for allowing their children to play games on the sidewalk. *Id.* The court found that the statute was unconstitutionally vague because it failed to define the term “game” and was overly broad because it could apply to anything from trading Pokémon cards and playing chess to playing tag during recess. *Id.* at 736–38. The broad reaches of the ordinance failed to be narrowly tailored for any government interest, and instead, the ordinance substantially burdened more speech than necessary. *Id.* at 737. Therefore, the court granted a preliminary injunction because it found that the ordinance was unconstitutional under rational basis scrutiny. *Id.* at 737–38. Later, the court granted a permanent injunction. *See Weigand v. Vill. of Tinley Park*, 129 F. Supp. 2d 1170, 1173 (N.D. Ill. 2001).

¹¹⁴ *Candy Lab*, 266 F. Supp. 3d at 1141.

¹¹⁵ *Id.*

¹¹⁶ Josephine Munis, *Candy Lab, Inc. Launches Texas Rope ‘Em!*, CANDY LAB NEWS (Mar. 12, 2017), <http://news.candy-lab.com/2017/03/candy-lab-inc-launches-texas-rope-em.html>.

¹¹⁷ *Candy Lab*, 266 F. Supp. 3d at 1141.

¹¹⁸ *See id.*

The ordinance required companies to obtain permits for virtual and location-based augmented reality games before the games would be permitted to be played in any Milwaukee County Parks.¹¹⁹ Once a permit was obtained, the company would have to limit the game to “those areas designated with a permit for such use by the Director of the Department of Parks, Recreation, and Culture [(“Director”)].”¹²⁰ The permit process included the Director reviewing the game “to determine the appropriateness of the application based on site selection, protection of rare flora and fauna, personal safety, and the intensity of game activities on park lands.”¹²¹ Although the game would only be permitted to operate during standard park hours, the Director could also authorize special events to occur outside the park’s normal operating hours.¹²²

The ordinance defined “virtual gaming” as “an activity during which a person can experience being in a three-dimensional environment and interact with that environment during a game.”¹²³ The ordinance further explained “virtual gaming,” stating that “the game typically consists of an artificial world of images and sounds created by a computer that is affected by the actions of a person who is experiencing it.”¹²⁴ The ordinance stated that Pokémon Go was an example of “virtual gaming,” and it implied that Pokémon Go would also be a “location-based augmented reality game[.]”¹²⁵ However, the ordinance never actually defined the term “location-based augmented reality game.”¹²⁶

The permit application required for “virtual gaming” was ten pages long and required a company to provide an extensive amount of information, including event dates and times, estimated attendance, if the event would be advertised and how, and the location within the park.¹²⁷ The companies were required to provide “detailed plans for garbage collection, on-site security, and medical services,” all of which the companies would

¹¹⁹ *Id.* at 1143.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1143–44.

have to provide for themselves.¹²⁸ The companies also had to have liability insurance and pay several fees.¹²⁹ Despite all of these requirements, the Director could still demand more information about the event, and after all of this, the parks have “sole discretion [to] grant, deny, revoke, or suspend any permit, at any time and for any reason.”¹³⁰ Violation of the ordinance could result in a myriad of punishments: Violators could be fined between \$10 and \$200, and an unpaid fine could result in a court order of up to ninety days in jail.¹³¹ Police officers could arrest violators, and the Director could even issue citations.¹³²

In response to this tedious permit process, Candy Lab, Inc., which planned to release the then-new location-based augmented reality game “Texas Rope ‘Em,” requested a preliminary injunction against the enforcement of the ordinance.¹³³ Before the court ultimately granted the preliminary injunction, the court first determined whether Texas Rope ‘Em qualified for First Amendment protection.¹³⁴ It accepted that video games had First Amendment protection and that the First Amendment continued to apply when newer mediums developed.¹³⁵ The court also believed that Texas Rope ‘Em contained enough expressive conduct to qualify for First Amendment protection even if the game itself “is not the expressive equal of *Anna Karenina* or *Citizen Kane*.”¹³⁶ Therefore, the court concluded that Candy Lab’s game enjoyed a measure of protection under the First Amendment.¹³⁷

¹²⁸ *Id.* at 1144.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1141. Candy Lab first launched Texas Rope ‘Em on March 10, 2017. See Candy Lab, Inc., *Welcome to Texas Rope ‘Em!*, YOUTUBE (Mar. 10, 2017), <https://www.youtube.com/watch?v=egt75ZrYH3Q>.

¹³⁴ See *Candy Lab*, 266 F. Supp. 3d at 1146.

¹³⁵ *Id.*; see *supra* note 12 and accompanying text.

¹³⁶ *Candy Lab*, 266 F. Supp. 3d at 1146 (quoting *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013)). The court made it clear that it was not going to make “aesthetic judgments, since the task of courts is not to act as critics.” *Id.*

¹³⁷ *Id.* at 1147. In concluding that Texas Rope ‘Em had First Amendment protection, the court is the first to recognize First Amendment rights for augmented reality games. *Id.* at 1146. Interestingly, another caveat for the court here was determining whether Texas Rope ‘Em qualified for protection despite having gambling elements to its gameplay. *Id.* at 1147. Because the game was free, lacked prizes, and relied on more than mere chance, the court believed that the game was not illegal gambling, which would have resulted in the game having no protection under the First Amendment. *Id.*

After determining that Texas Rope ‘Em qualified for First Amendment protection, the court analyzed whether Milwaukee County’s ordinance was a reasonable time, place, and manner restriction on location-based augmented reality games.¹³⁸ The court first determined that the ordinance was content-neutral because the undesirable effects of Pokémon Go—not a disdain for Pokémon Go itself—prompted the legislature to create regulations that would prevent other and all augmented reality games from reproducing those undesirable effects.¹³⁹ The fact that the regulation applied only to a subset of the augmented reality medium did not result in a contrary conclusion.¹⁴⁰ Although one could argue that the ordinance attacked the expressive quality of location-based augmented reality games themselves because it limited the interactive aspects of the game, the court was unwilling to take the analysis to this extreme.¹⁴¹

Despite holding that the ordinance was content-neutral, the court found that the ordinance had myriad problems, making it unconstitutional.¹⁴² Among these problems was that the ordinance did not appear to be narrowly tailored to serve the government’s interests.¹⁴³ Instead of targeting the players, the ordinance targeted the companies producing augmented reality games.¹⁴⁴ In targeting the companies, the ordinance treated the playing of location-based augmented reality games as if such playing constituted an event that required the companies to provide clean-up and security, have insurance, and provide a general time frame in which people will be at the parks playing.¹⁴⁵ Yet this was entirely inconsistent with how people play these games.¹⁴⁶ The average player plays whenever she has

¹³⁸ See *id.* at 1148.

¹³⁹ See *id.* at 1149.

¹⁴⁰ See *supra* note 25 and accompanying text.

¹⁴¹ See *Candy Lab*, 266 F. Supp. 3d at 1150. The argument was that a major part of the gameplay of augmented reality video games is interacting with the real world. Ordinances such as Milwaukee’s would seriously restrict gameplay by limiting the areas in which a person could physically play the game, thus limiting part of the expression. *Id.*

¹⁴² See generally *id.*

¹⁴³ See *id.* at 1153.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* Events may sometimes be coordinated in advance to occur at a certain place, but they are not the norm. It took Niantic a year to hold its first official “Pokémon Go Fest,” and it is unlikely to have another official in-person event any time soon. See Megan Farokhmanesh, *I Went to Pokémon Go Fest, and It Was a*

some free time regardless of the time or location.¹⁴⁷ Regulating augmented reality games in such a manner is similar to requiring a company to obtain a permit every time someone wants to read its book in a park. It expects a company to know when such an event will occur even though people usually read at their own inclination.¹⁴⁸ In short, the ordinance showed that the government, in its misunderstanding of augmented reality games, “sacrific[ed] speech for efficiency,” which is impermissible.¹⁴⁹

The court did not address whether the ordinance left ample alternative channels for communication of the expression. However, the ordinance might fail this prong as well. The ability to play location-based augmented reality games anywhere is already curtailed by people’s privacy rights.¹⁵⁰ The areas where these games have the most First Amendment protection are public forums such as parks and sidewalks.¹⁵¹ Because of how difficult it would be to obtain a permit based on Milwaukee’s ordinance, the playing of augmented reality games would practically be limited to only sidewalks. Whether the sidewalks alone leave ample alternatives for location-based augmented reality games would be a difficult issue to determine, but given the large amount of protection the First Amendment provides in public forums,¹⁵² such a limitation would likely fail this prong.¹⁵³

The permit requirement also fails in being a reasonable time, place, and manner restriction. A significant defect is that the permit process left too much discretion to the licensing authority.¹⁵⁴ Under the ordinance, the licensing authority “in its sole discretion [could] grant, deny, revoke, or suspend any

Disaster, THE VERGE (July 25, 2017, 11:37 AM), <https://www.theverge.com/2017/7/25/16019404/pokemon-go-fest-refunds-disaster-review>.

¹⁴⁷ See *Candy Lab*, 266 F. Supp. 3d at 1153.

¹⁴⁸ This metaphor illustrates the problems of the ordinance’s permit process, but books and location-based augmented reality games are not completely analogous since companies do have some control over where elements of their games appear. See Class Action Complaint, *supra* note 108, at 6–7.

¹⁴⁹ See *Candy Lab*, 266 F. Supp. 3d at 1154 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014)).

¹⁵⁰ See Class Action Complaint, *supra* note 108, at 3–4.

¹⁵¹ See cases cited *supra* note 32.

¹⁵² See cases cited *supra* note 32.

¹⁵³ *But cf.* *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986) (holding that leaving a little over five percent of the entire land area in Renton open for use as an adult theater site allowed for ample alternative channels of communication).

¹⁵⁴ See *Candy Lab*, 266 F. Supp. 3d at 1151–52.

permit, at any time and for any reason.”¹⁵⁵ Such unbridled discretion is not constitutional.¹⁵⁶ Even without this warning on Milwaukee’s permit application, the standards themselves were so vague that they allowed too much discretion on their own.¹⁵⁷

The ordinance listed several criteria that would be used to determine whether to grant a permit, mainly “the appropriateness of the application based on site selection, protection of rare flora and fauna, personal safety, and the intensity of game activities on park lands.”¹⁵⁸ The court questioned how a company would know which plants were “rare,” or when people were trampling on too many flowers, or how “intensity” was defined.¹⁵⁹ The ordinance also failed to explain what “site selection” would be appropriate for augmented reality games.¹⁶⁰

Another consideration the ordinance listed was “personal safety.”¹⁶¹ The court recognized that safety could be a reasonable concern allowed under the First Amendment, but it did not accept that “personal safety” was definite enough to be reasonable.¹⁶² Indeed, the entire ordinance was riddled with indefiniteness, for the ordinance did not define the term “location-based augmented reality games.”¹⁶³ Because the considerations themselves were vague and the licensing authority had too much discretion, the court concluded that the ordinance also lacked the necessary procedural safeguards required for permits to be valid under the First Amendment.¹⁶⁴ Without adequate standards, a court would have trouble providing judicial review.¹⁶⁵ In other words, “[w]ithout these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making

¹⁵⁵ *Id.* at 1151.

¹⁵⁶ *See supra* note 85 and accompanying text.

¹⁵⁷ *See Candy Lab*, 266 F. Supp. 3d at 1152–53.

¹⁵⁸ *Id.* at 1151.

¹⁵⁹ *See id.* at 1152.

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *See id.* at 1152–53.

¹⁶³ *See id.* at 1143.

¹⁶⁴ *See id.* at 1150–52.

¹⁶⁵ *See id.* at 1151.

it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.”¹⁶⁶

III. REGULATING THE PLAYERS WITH REASONABLE TIME, PLACE, AND MANNER RESTRICTIONS WOULD BEST PROTECT THE GOVERNMENT'S INTERESTS AND PROTECT THE RIGHTS OF THE DESIGNERS AND PLAYERS

The ordinance in *Candy Lab* imposed such a significant number of requirements that the court rightfully granted a preliminary injunction against its enforcement.¹⁶⁷ Yet the heavy burden imposed by the ordinance ultimately made it an easy case to determine. The more difficult questions are whether and when the government may restrict location-based augmented reality games in public forums.

A. Defining “Location-Based Augmented Reality Games”

Before placing any sort of restrictions on location-based augmented reality games, there needs to be a working definition for “location-based augmented reality games.” Without a workable definition, a law will likely fail for being unconstitutionally vague.¹⁶⁸ In attempting to define the term, a good place to begin would be the dictionary.¹⁶⁹ As stated in the Introduction, augmented reality is “an enhanced version of reality created by the use of technology to overlay digital information on an image of something being viewed through a device.”¹⁷⁰ Location-based augmented reality uses GPS or technology of a similar nature to project the augmented images

¹⁶⁶ See *id.* (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988)).

¹⁶⁷ The *Weigand* court later held the ordinance that prohibited playing games was both facially and otherwise unconstitutional. See *Weigand v. Vill. of Tinley Park*, 129 F. Supp. 2d 1170, 1173 (N.D. Ill. 2001). The court therefore granted a permanent injunction. *Id.*

¹⁶⁸ *Weigand v. Vill. of Tinley Park*, 114 F. Supp. 2d 734, 738 (N.D. Ill. 2000); cf. *Candy Lab*, 266 F. Supp. 3d at 1143 (noting that “location-based augmented reality games” were not defined in the ordinance).

¹⁶⁹ Justices may sometimes use dictionaries to help them determine the boundaries of a statute. For example, Justice Alito referred to the dictionary to define the word “maiming” when it lacked a definition under California law. See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 810 & n.4 (2011) (Alito, J., concurring).

¹⁷⁰ See *supra* note 5 and accompanying text.

when someone goes from one place to another.¹⁷¹ Therefore, a potentially good definition of location-based augmented reality would be “an enhanced version of reality that uses GPS, satellite, or other similar technology to overlay, or project, a digital image of something being viewed through a smartphone, tablet, or other similar device.”¹⁷²

B. Creating a Reasonable Time, Place, and Manner Restriction

Once there is a working definition, the legislature would need to devise a reasonable time, place, and manner restriction. Some might argue that no time, place, and manner restriction would be reasonable in a public forum because such a restriction would limit the interactive part of the expression of the game.¹⁷³ Location-based augmented reality games are distinct from other video games because the vast majority of the gameplay requires traveling to different locations to access features of the game; they are not like standard video games which will provide the same gameplay and features regardless of the location. By limiting location-based augmented reality games even in public forums, the government would arguably be limiting the expression itself because players would then be unable to play the game the way it was meant to be played.

This argument that no time, place, and manner restriction in a public forum would be reasonable would likely fail in a courtroom. Policy considerations would most likely lead a court to conclude that a time, place, and manner restriction can be upheld, but the government has to do its part in making the restriction reasonable.¹⁷⁴ Before a court will consider a

¹⁷¹ See *supra* note 7 and accompanying text.

¹⁷² Limiting restrictions on augmented reality games to only those that are location-based could potentially cause other problems. For example, in 2012, Nintendo released the game “Spirit Camera: The Cursed Memoir,” a Nintendo 3ds game whose gameplay and extra features relied heavily on the use of marker-based augmented reality in the form of QR codes. See *Spirit Camera: The Cursed Memoir*, NINTENDO, <https://www.nintendo.com/games/detail/ZIXHN669zp19PVP0PJ7Nh8K4TVZ2DBKU> (last visited Feb. 7, 2019). While the gameplay is limited to a smaller vicinity than that of any location-based augmented reality game, “Spirit Camera: The Cursed Memoir” still requires a player to do some moving around to play the game. See Audrey Drake, *Spirit Camera: The Cursed Memoir Review*, IGN (Apr. 13, 2012), <http://www.ign.com/articles/2012/04/13/spirit-camera-the-cursed-memoir-review>. It would seem strange for a person to be allowed to play this augmented reality game in an area while prohibiting location-based augmented reality games.

¹⁷³ See *supra* note 141 and accompanying text.

¹⁷⁴ See *Candy Lab, Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139, 1154 (E.D. Wis. 2017).

restriction reasonable, the government interest must be significant.¹⁷⁵ The concerns surrounding players of location-based augmented reality games are that people will play while driving, damage parks, litter, and disturb other people while playing. Preventing or limiting all of these things are significant government interests that the courts recognize.¹⁷⁶ Although a government interest may be significant—and the interest in curbing the harmful effects of location-based augmented reality games is significant—a law will not be reasonable if it substantially burdens more speech than necessary in advancing the government's goals.¹⁷⁷

1. Regulating the Designers

Requiring companies to obtain permits for public forums whenever they release a new location-based augmented reality game may never be reasonable because such a requirement would substantially burden more speech than necessary, especially if the process of obtaining each separate permit required paying fees.¹⁷⁸ Imagine that a company releases its game in every city in the United States, and then imagine that company filling out permit applications and paying fees to every municipality just to release its game. Faced with the prospect of hundreds of applications and fees, the company may choose to seriously limit its locations in the United States or avoid releasing a game in the United States entirely, thus effectively “shut[ting] off communication before it takes place.”¹⁷⁹

Requiring the company to obtain permits would also be ineffective in advancing the government's interest since the people playing location-based augmented reality games are causing the undesirable effects. Obtaining a permit is not going to prevent a person playing one of these games from littering or sneaking into a park after hours. In fact, the company has little control over when people decide to play their game.¹⁸⁰ Therefore,

¹⁷⁵ See *supra* note 53 and accompanying text.

¹⁷⁶ See *supra* note 61 and accompanying text.

¹⁷⁷ See *supra* note 68 and accompanying text.

¹⁷⁸ Charging a fee to obtain a permit, however, may be impermissible. See *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (“There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated.”).

¹⁷⁹ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970).

¹⁸⁰ This is not to say that companies should not attempt to curb some of the problems that have arisen related to location-based reality games. For example, a

requiring the company to obtain a permit for people to play their game in a public forum is likely unreasonable unless the company intends to host an official event like Niantic did with Pokémon Go Fest.¹⁸¹

2. Regulating the Players

Indeed, targeting the company because of the conduct of the players is equivalent to “burn[ing] the house to roast the pig.”¹⁸² A better approach would be to regulate the players themselves.¹⁸³ However, when regulating the players, there is a tension. On the one hand, the players are protected under the First Amendment. On the other hand, non-players have their own rights, and the government has interests to protect.

a. *The Rights of Individual Players Versus the Rights of an Assembly of Players*

Part of the difficulties involved in regulating players results from the number of players playing at a given time in a given place. An individual player can cause problems if she breaks into a park at night or tries to cross the street without paying attention. Yet the individual player would be easier to regulate, and she is much less likely to infringe on the rights of non-players. When the individual player becomes a group, or an assembly, more problems arise, the group becomes harder to regulate, and more non-players have likely had their rights infringed upon. Yet the rights of the assembly of players are arguably more protected by the First Amendment than the rights of the individual player because a court may consider an individual's act of playing to be less deserving of protection as expressive conduct.¹⁸⁴

company could lock down its application once a person starts moving over twenty miles per hour, thus eliminating accidents occurring when a person plays a game while driving. See Eric Lindenfeld, *Pokemon Go's Product Liability Woes*, LAW360 (Aug. 3, 2016, 3:56 PM), <https://www.law360.com/articles/824588/pokemon-go-s-product-liability-woes>. A company could also have its game display a warning screen reminding the player to be aware of his or her surroundings when playing the game. *Id.*

¹⁸¹ See Farokhmanesh, *supra* note 146.

¹⁸² *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

¹⁸³ See *Candy Lab, Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139, 1153 (E.D. Wis. 2017) (citing *Butler*, 352 U.S. at 383).

¹⁸⁴ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“[E]xpressive conduct [is] protected to some extent by the First Amendment.”).

When an individual plays a location-based augmented reality game, the act of playing is the expression. Some may argue this activity is merely a “kernel of expression,” and thus, not deserving of protection.¹⁸⁵ However, “video games communicate ideas—and even social messages—through many familiar literary devices . . . and through features distinctive to the medium.”¹⁸⁶ Therefore, the Supreme Court has recognized that video games deserve First Amendment protection.¹⁸⁷ If location-based augmented reality games had First Amendment protection, but an individual player playing an augmented reality game had less protection than the game itself, then, taken to its logical extreme, the protection of the expression of the game would be defeated because no one would be able to enjoy the expression of the game. This problem would be akin to allowing a company to publish a book but then censoring the public from reading it. This logical extreme is not to say that *any* regulation would be unconstitutional; for example, requiring individual players to abide by park rules would be constitutional as long as they were reasonable time, place, and manner regulations.¹⁸⁸ The point is that the individual’s act of playing deserves First Amendment protection. This Note argues that both individual players and groups of players are equally deserving of protection; however, legislatures should sometimes regulate individual players differently than they regulate groups of players because groups cause different problems.

There are two ways to think about groups of players. These groups may be classified as assemblies, which have been thought to mean ad hoc groups that may appear spontaneously.¹⁸⁹ Alternatively, these groups may be classified as associations, which are more permanent groups that meet.¹⁹⁰ Groups of players appear to have elements of assemblies and associations. For example, a player may decide to go out with his or her friends with the intent to play an augmented reality game. The

¹⁸⁵ See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

¹⁸⁶ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

¹⁸⁷ See *id.*

¹⁸⁸ See *Clark*, 468 U.S. at 298 (“All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace.”). On a similar note, legislatures may prohibit people from reading in certain circumstances, such as when they are driving vehicles.

¹⁸⁹ See *supra* note 104 and accompanying text.

¹⁹⁰ See *supra* note 104 and accompanying text.

group gets to their agreed-upon location only to find dozens of other people playing the same game. Organically, an assembly has formed. Now suppose this player goes out to the same location every few days, knowing or expecting that she will find other players there. Suddenly, the lines blur, and this group of people is edging towards an association. In the context of one game, the difference matters very little because the players have the same rights whether they consider themselves a more permanent group or casual players.¹⁹¹ What matters is that there is a group of people assembling, and this assembling is generally protected by the First Amendment even if the reason for assembling is to play a location-based augmented reality game.¹⁹²

b. Enforcing Laws Already in Effect

In *Candy Lab*, the court made several suggestions about how to regulate players, including “aggressively penalizing gamers who violate park rules or limiting gamers to certain areas of the park.”¹⁹³ Either of these suggestions could be reasonable. For example, most parks have a closing time. Rather than being given a warning, players who are caught breaking such rules should be ticketed and have to pay a nominal fine. Players who become too loud out of excitement may be charged with noise violations. Players who decide to walk into the street to play may get fined for jaywalking. If officers enforce these and other similar laws, then players may be deterred from engaging in some of their bad behaviors. The benefit of targeting these violations of the law is that they do not impermissibly infringe on First Amendment rights. The disadvantages are that targeting such violations becomes harder as the number of players

¹⁹¹ This distinction might matter if players of different games find themselves conflicting within the same spheres. Then the players might associate strongly with one game over another. *See supra* note 4. It would be interesting if players argued that they had the freedom from associating with players of other games. *Cf.* *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 680 (2010) (“‘Freedom of association,’ we have recognized, ‘plainly presupposes a freedom not to associate.’” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted)). However, such an analysis is outside the scope of this Note.

¹⁹² *See supra* note 95 and accompanying text.

¹⁹³ *Candy Lab, Inc. v. Milwaukee Cty.*, 266 F. Supp. 3d 1139, 1153 (E.D. Wis. 2017).

increases. Stopping and fining one or two violators would be easier than attempting to fine dozens of violators. Likely, several violators would manage to avoid being penalized.

Unlike an individual player, an assembly of players could also potentially violate laws that require permits for gatherings of a large group of people.¹⁹⁴ Because of the organic nature of these player assemblies, it would seem unjust to fine players who appear in an assembly—even if large groups consistently form at a certain place at a certain time. In such situations, officers should be able to disperse the players, but this solution appears problematic because of the general nature of location-based augmented reality games. How does society expect players to obtain permits when the location, time frame, and number of players is so uncertain?¹⁹⁵ Whether an individual or a group is playing, reasonable time, place, and manner restrictions should effectively curb the problems caused by players while permissibly restricting the players' rights.

c. Reasonable Regulations in Parks

Limiting the players to certain areas might be an effective time, place, and manner restriction. The downside of this limitation is that it could slip into an impermissible restriction of the First Amendment. One issue is how the government can balance its interests with accommodating the players. If players were limited to only the sidewalks, their gameplay would be quite limited. Additionally, players might cause problems for pedestrian traffic, thus creating another issue for the government. If players are limited to only certain areas within public parks, how would the government choose the areas to allow players to use? The number of players may be determinative in where they could play because a group of two players would be much less disruptive than a group of twenty. Additionally, the size of the parks and proximity to other parks might matter.

Other considerations might include whether the parks were designed with specific purposes in mind. A large park like Central Park could theoretically have multiple areas designated

¹⁹⁴ For example, New York City requires one to obtain a permit to have an activity in a park with a group of twenty or more people. See *Parks Special Event Permit Request*, N.Y.C. DEP'T OF PARKS & RECREATION, <https://nyceventpermits.nyc.gov/Parks/> (last visited Feb. 7, 2019).

¹⁹⁵ See *supra* note 146 and accompanying text.

for players of location-based augmented reality games while avoiding certain areas designated as quiet areas or in areas where a player could most damage herself. But if all of the closest parks are small, maybe less than a city block, then it might be more worthwhile to allow play in some of the parks but not all of them. In such situations, the government may consider the accessibility of parks. If there are four parks all within equal distance of each other, it might be beneficial to say that augmented reality games could be played in two of them. Park rules could allow the playing of location-based augmented reality games on certain days, either alternating the days or limiting them to the weekend when most people would be playing. One issue with such limitations, however, is that when fewer players are playing, they might not cause enough problems to warrant being limited to only certain areas or certain parks.

The government may also consider the typical users of particular parks. For example, it may not be reasonable for players to play augmented reality games in a dog park, but it would likely be reasonable to allow players to play in parks with no specific designation. Whether it would be reasonable to play location-based augmented reality games in playgrounds may depend on the age of the players. If children and their guardians were the players, such playing may be acceptable since playgrounds are designed for children. However, if older players were invading playgrounds to play augmented reality games, they could potentially overtake the space from children. The safety of children may also be affected if adults were suddenly loitering in playgrounds. In such situations, a reasonable time, place, and manner regulation may be to create rules that only allow children and their guardians on the playground.

Suppose a park that previously had no particular purpose or few daily visitors develops into a frequented location for location-based augmented reality game players. In many ways, such a development would be good because it would mean that players have a place to play without disturbing other people or activities. Now suppose that the government chooses to repurpose the park into a swimming pool or another facility that would remain public but would no longer be suitable for playing augmented reality video games. Then the players would likely have a claim against the repurposing of the park because they are losing a place to freely play. Not only would they lose a place to play, but they may also then flock to other areas, causing overcrowding

and other irritations that were previously eased by this park that had mainly been used by location-based augmented reality game players. Alternatively, players may have already been limited to this park because other areas prohibit or severely limit the playing of augmented reality games. Then players would have difficulties playing at all. Ultimately, whether repurposing the park would be reasonable would depend on the importance and necessity of the new facility and on how burdensome the repurposing would be on location-based augmented reality game players.

d. Reasonable Regulations on Sidewalks

In addition to some limitations in parks, some limitations on playing on sidewalks might be reasonable. For example, suppose that features of augmented reality games appear within a hospital, and these features cause players to regularly roam around that hospital. If such roaming interferes with hospital employees' abilities to work, a small buffer zone might be warranted to protect the health and safety of citizens.¹⁹⁶ Legislatures may also potentially prohibit players from playing augmented reality games on the sidewalk in front of a post office—or any other sidewalk that may not be a public forum.¹⁹⁷ Finally, if players are consistently gathering on certain streets to the point where they are preventing the free flow of pedestrian traffic, then it may be reasonable to prohibit players from playing augmented reality games on those sidewalks.

The areas in question may need to be areas that generally have a large amount of foot traffic for the prohibition to be reasonable. Alternatively, the prohibition may be only for a few hours when the foot traffic would be most heavy—for example, during rush hour on weekdays. To warn players about these regulations, signs could be placed in those areas that would be affected. Like there are signs to warn people about fines for littering and about alternate side parking days, there could be signs on busy streets that would prohibit the playing of augmented reality games Monday through Friday between the hours of 4:00 PM and 6:00 PM. Although this prohibition may

¹⁹⁶ The Supreme Court has recognized that ensuring public safety is a significant government interest. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997).

¹⁹⁷ *See United States v. Kokinda*, 497 U.S. 720, 728–29, 732–33 (1990).

not be reasonable for the individual player, this limited prohibition could prevent congestion when sidewalks are most frequented.

e. Reasonable Regulations in Streets

Prohibiting players from playing augmented reality games on streets could also potentially be constitutional, especially in areas that have excessive motor vehicle traffic. Problems would arise, however, in areas where there are no sidewalks. If an ordinance prohibits people from playing augmented reality games in the streets, then the area of play would be vastly limited in areas where streets lack sidewalks. It may also be unreasonable to prohibit someone from playing augmented reality games on streets that are always closed to motor vehicles or on occasions where the street is closed for a block party or festival. If the government's interest is to prevent players from causing motor vehicle accidents or from causing traffic, then such prohibitions during a block party or a festival would seem overbroad.

Ideally, in areas with sidewalks, legislatures can pass regulations which limit the playing of augmented reality video games to sidewalks and to streets which drivers are prohibited from driving on at that time. Such a regulation would prevent motor vehicle accidents caused by distracted pedestrian players while still allowing players to play on streets that lack motor vehicle traffic either temporarily or constantly. In suburban and rural areas that lack sidewalks, prohibiting players from playing in streets may be reasonable on especially busy roads—for example, roads that have multiple lanes—but are likely unreasonable in the majority of circumstances.

CONCLUSION

As augmented reality becomes more assimilated into society, courts will be forced to determine the boundaries of location-based augmented reality games in relation to their First Amendment rights in traditional public forums. Likely, permits are not viable solutions due to the general nature of gameplay, especially if the permits are aimed at the companies rather than the players. Time, place, and manner restrictions that regulate

the players would likely be the most effective way to curb some problems that result from people playing location-based augmented reality games, but creating a restriction that is constitutional is a challenge that legislatures must test.

The most effective way to ease problems caused by individual players would be to enforce laws already in effect. Such enforcement would be most consistent with the First Amendment rights of the players while safeguarding the government's legitimate interests. To ease problems caused by assemblies of players, legislatures will likely have to create new laws. Some reasonable time, place, and manner regulations may include small buffer-zones around hospital entrances, prohibiting playing in streets that have excessive motor vehicle traffic, and allocating areas for groups of players to freely play.

At times, reasonable time, place, and manner regulations for groups may be unreasonable for individual players. For example, prohibiting the playing of augmented reality games during rush hour on busy sidewalks would better allow for the free flow of foot traffic, but likely one player could be playing on a busy sidewalk without causing more pedestrian congestion. Likewise, an individual playing in a designated quiet section of a park would likely not disturb the tranquility of the area even if an assembly of players would. In such situations, it would be unfair to restrict individual players the same way that one would restrict assemblies of players. However, individual players could quickly transform into an assembly of players organically, thus causing the same problems as if the assembly had been premeditated. Legislatures and courts may need to choose between sacrificing some of the protections afforded to individual players and enabling the government to protect legitimate government interests that are threatened by assemblies of players.

Whether the law should favor individual players or legitimate government interests will depend on the circumstances. If statistics indicate that a specific area is more prone to large assemblies of players to the detriment of non-players and the purpose of the space, then it may be reasonable to sacrifice some First Amendment protections of individual players. Prohibiting the playing of augmented reality games on excessive foot traffic sidewalks during rush hour would likely be reasonable if statistics indicated a consistent issue. Prohibiting players from playing in quiet areas in parks may also be

reasonable if groups of players are consistent problems, but then players would need other areas available for them to play. It would be unreasonable to slowly prohibit players from playing in every section of a large park because they had been prohibited from playing in other areas. Designated playing areas may make prohibiting players from playing in other areas more reasonable.

While regulating the players would likely be the most effective in protecting legitimate government interests, some measures regulating designers may be reasonable. For example, the legislature could require designers to prevent gameplay from occurring when a person is moving over fifteen miles per hour.¹⁹⁸ Ultimately, what will be reasonable regulations for either players or designers will depend on the circumstances.

¹⁹⁸ See *supra* note 180.